No. 243.

Reply Brf. of Dickson v Bullitt for D. E.

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JAMES H. McKENN
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IN THE SUPREME COURT OF THE UNITED STATES.

Filed April 20, 1898.

The County of Mercer, in the State of Kentucky, Plaintiff in Error,

vs.

The Provident Life and Trust Company, Defendant in Error.

October Term, 1897.

No. 243.

REPLY TO BRIEF FOR PLAINTIFF IN ERROR.

In the original brief for the defendant in error, the argument is based almost exclusively upon a discussion of the decisions of this court relating to municipal bonds; but in that for the plaintiff in error, pages 26–7, citations are made as to the effect of the delivery of a deed lodged in escrow, before the performance of the condition. Conceding that the contention of Vaughan, Sergeant, in Derby Canal Company *vs.* Wilmot, 9 East., 360, upon the authority of the case of the Dean and Chapter of Fernes, Dav. Rep., 44 *b*, 2 Rol. Abr., 23, l. 50—that "a deed of a corporation needs no delivery, but the affixing of the common seal gives it perfection without delivery"—would not now be accepted as sound, yet the well-established qualifications of the general rules quoted from Devlin on Deeds are sufficient to render them inapplicable to the present case. The subject is discussed very satisfactorily by Mr. Jones in his recent work on the Law of Real Property in Conveyancing, and his conclusions are thus stated:—

"The better opinion, however, upon principle, and that supported by the weight of authority, is that a subsequent purchaser in good faith acquires a good title, though his grantor had received his deed from a depositary without performing the condition upon which such deed was

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to be delivered. The depositary of the deed is the agent of the grantor as well as of the grantee. (Bailey *vs.* Crim, 9 Biss., 95; Blight *vs.* Schenck, 10 Pa. St., 285, 51 Am. Dec., 478; Somes *vs.* Brewer, 2 Pick., 183, applicable in principle; Quick *vs.* Milligan, 108 Ind., 419, 9 N. E. Rep., 392; Simpson *vs.* Bank, 43 Hun., 156, affirmed 120 N. Y., 623; Simpson *vs.* Del Hoyo, 94 N. Y., 189; Hubbard *vs.* Greeley, 84 Me., 340, 24 Atl. Rep., 799.) 'If a man employs an incompetent or unfaithful agent, he is the cause of the loss so far as an innocent purchaser is concerned, and he ought to bear it, except as against the party who may be equally negligent in omitting to inform himself of the extent of the authority, or may commit a wrong by acting knowingly contrary to that. But this principle must not be extended to a person who has no possible means of protecting himself; who acts on the presumption that the records of the county are not intended to mislead, but speak the truth; that the acts and declarations of the grantor are such as they purport to be. If the grantor is injured by the conduct of his agents, the remedy is against them; surely there is no reason that it should affect an innocent purchaser, who pays his money on the faith that his title is good. Nor is it any answer that he may protect himself by proper covenants.' (Blight *vs.* Schenck, 10 Pa. St., 285, 293; 51 Am. Dec., 478, per Rogers, J.) To like effect, in a Massachusetts case, Chief Justice Parker said: 'It is a general and just rule that, when a loss has happened which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which caused or contributed to the misfortune. A man can scarcely be cheated out of his property, especially of real estate, in such manner as to give an innocent purchaser a right to hold according to the principles which have been mentioned, without a degree of negligence on his part which should remove all ground of complaint.' (Somes *vs.* Brewer, 2 Pick., 184, 202; 13 Am. Dec., 406.) This subject is also considered in a well-reasoned and conclusive opinion by Judge Walton in a recent case in Maine. He says: 'Escrows are deceptive instruments. They are not what they purport to be. They purport to be instruments which have been delivered, when, in fact, they have not been delivered. They clothe the grantees with apparent titles which are not titles. Such deeds are capable of being used to enable the grantees to obtain credit which otherwise they could not obtain. They are capable of being used to deceive innocent purchasers, and the makers of such instruments cannot fail to foresee that they are liable to be so used. And when the maker of such an instrument has voluntarily parted with the possession of it, and delivered it into the care and keeping of a person of his own selection, it seems to us that he ought to be responsible for the use that may in fact be made of it, and that in no other way can the public be protected against the intolerable evil of having our public records incumbered with such false and deceptive instruments.' (Hubbard *vs.* Greeley, 84 Me., 340; 24 Atl. Rep., 799.)" Vol. II., section 1316.

"Another and conclusive consideration why the title of a *bona fide* purchaser for value should not be disturbed, by reason that any former owner has obtained possession of his deed wrongfully or fraudulently, is that all titles would thereby be rendered insecure. As declared in the Pennsylvania case above cited, 'if a title may be avoided under such circumstances, no purchaser is safe;' or, as said by Judge Walton in the recent decision in Maine, 'all titles would be as unstable as sand upon the seashore.' In the Massachusetts case, Chief Justice Parker on this point said: 'This admission is certainly correct, for there could be no security of title if a purchaser from one actually seized and possessed, with an apparently lawful title existing on the public records, he having no knowledge of a concealed defect in the title of his grantor, should be liable to be defeated of his title by proof of fraudulent acts of his immediate or remote grantor, of the existence of which he had not even a suspicion; and if the principle on which the argument is founded is true, the purchaser would, at least for forty years, hold an estate defeasible by the oral proof of facts to which he was neither a party nor privy, transacted by some anterior parties to the title, perhaps after twenty years or more conveyances, all appearing unimpeachable on the records.' (Somes *vs.* Brewer, 2 Pick., 184, 190; 13 Am. Dec., 406. See to like effect Miller *vs.* Fletcher, 27 Gratt., 403, 414, per Staples, J.; Quick *vs.* Milligan, 108 Ind, 419, 9 N. E. Rep., 392, per Elliott, C. J.)" Section 1317.

"In Fletcher *vs.* Peck, 6 Cranch, 87, 133, the opinion of the court being by Chief Justice Marshall, he said: 'If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside as between the parties. But the rights of third persons, who are purchasers without notice and for a valuable consideration, cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect arising from the conduct of those who held the property before he acquired it, of which he had no notice, such concealed defect cannot be set up against him. He has paid his money for a title good at law, and he is innocent, whatever may be the guilt of others; and equity will not subject him to the penalties of other's guilt. All titles would be insecure, and the intercourse between man and man very seriously obstructed, if this principle were overturned.'

"The grantor is estopped from questioning the title of a purchaser in good faith from a grantee who has fraudulently obtained possession of the deed from the depositary. Whenever the title reaches the hands of such a purchaser for value the rights and equities of the defendant owner are cut off. The grantor has by his own act placed the *indicia* of title in the grantee, and, though the latter has fraudulently obtained possession of the deed, the grantor who by his act has invested the grantee with the apparent title should suffer the loss rather than the innocent purchaser who has, trusting in this apparent title, paid value for the property.

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(Simson *vs.* Bank, 43 Hun., 156, affirmed 120 N. Y., 623; Simpson *vs.* Del Hoyo, 94 N. Y., 189; Quick *vs.* Milligan, 108 Ind., 419, 9 N. E. Rep., 392.)

"Of course a subsequent purchaser with notice from one to whom the deed held in escrow has been delivered, without authority, has no greater rights than the grantee. (Illinois Cent. R. Co. *vs.* McCullough, 59 Ill., 166; Abbott *vs.* Alsdorf, 19 Mich., 157; Lewis *vs.* Prather (Ky.), 21 S. W. Rep., 538.)" Section 1318.

The final sentence—*a subsequent purchaser with notice has no greater rights than the grantee*—suggests the real question in this case. Two of the authorities cited by the author were cases of actual notice, in fact, and in the other the first vendor was still in possession, so that they present no difficulty in principle; but in this case, it is conceded that the purchaser had no actual notice. The plaintiff in error is obliged to maintain, therefore, that the statement upon the face of the bonds, that they were originally delivered in escrow, puts the purchaser upon inquiry, and affects him with constructive notice of all that inquiry would have developed. In support of this assertion no authority is adduced, and it is submitted that, considering the nature of the securities involved, such could not have been the intention of the legislature. Without repeating what has been already urged in the original brief and supplemental note as to the futility of inquiry, which must have proved unavailing, and as to the effect to be given to the fact that the legislature had made the bonds in terms negotiable, and thereby excluded the duty of inquiry, a brief reference to some of the more important authorities, upon the subject of the constructive notice, which will affect a *bona fide* purchaser for value, may be useful.

In Jones *vs.* Smith, 1 Hare, 55, V. C. Wigram said that—

"The cases in which constructive notice has been established resolve themselves into two classes: First, in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected; and secondly, cases in which the court has been satisfied, from the evidence, that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice.

"The proposition of law upon which the former class of cases proceeds is not that the party charged had notice of a fact or instrument which, in truth, related to the subject in dispute without his knowing that

such was the case, but that he had actual notice that it did so relate. The proposition of law upon which the second class of cases proceeds is not that the party charged had incautiously neglected to make such inquiries, but that he had designedly abstained from such inquiries, for the purpose of avoiding knowledge—a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind—if mere want of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to the purchaser, there the doctrine of constructive notice will not apply; there the purchaser will, in equity, be considered, as in fact he is, a *bona fide* purchaser without notice."

Lord St. Leonards defines it as follows:—

"Constructive notice, in its nature, is no more than evidence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted; but courts of equity will not extend the doctrine to cases to which it has not hitherto been held applicable. The question upon constructive notice is not whether the purchaser had the means of obtaining, and might, by prudent caution, have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence."

2 Sugden, V. & P., 755.

In Ware *vs.* Lord Egmont, 4 DeG., M. & G., 473, Lord Cranworth expressed his entire concurrence in what on many occasions of late years had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine—to attempt to apply it to cases to which it had not hitherto been held applicable. When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him; that he would have acquired it but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross

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or culpable negligence. It was obvious that no definite rule as to what will amount to gross or culpable negligence, so as to meet every case, could possibly be laid down. And in Attorney-General *vs.* Stephens, 6 DeG., M. & G., 148, he observed that he believed that the length to which the doctrine of constructive notice had been extended had often been productive of very considerable inconvenience and had injuriously impeded the free transfer of real property. And in Montefiore *vs.* Browne, 7 H. L. C., 241, 269, Lord Chelmsford said he agreed with the cases cited, that constructive notice cannot be imputed to a party unless his ignorance amounts to gross or culpable ignorance. Lord St. Leonards, in the last (fourteenth) edition of his work on "Vendors and Purchasers," cites these cases with approval, and gives the terms of an Act which he introduced into the House of Lords to limit the operation of implied notice against an innocent purchaser. It would seem to have been little more than declaratory of the doctrine as above stated.

In England, where the equitable lien of the vendor prevails against the purchaser and all claiming under him with notice, though for a valuable consideration (2 Sugden, V. & P., 680), it does not prevail against a *bona fide* purchaser without notice, and the mere deduction of the title to the estate from the first vendor by recital will not be sufficient to affect him, for that does not show it was not paid for. (1 Bro. C. C., 302.)

Where the seller, who had not been paid all the purchase money, although he had acknowledged the receipt of it in the body of the deed and by indorsement, was in possession of the estate as lessee to the equitable tenant for life, under the settlement for the uses of which the estate was purchased, annuitants under the equitable tenant for life were held not to be bound by the vendor's lien, in consequence of their attorney having had notice that the seller was in possession of the estate; for as the seller had declared by the conveyance that he had received all the money, no man could be expected to inquire whether the purchase money had been paid.

White *vs.* Wakefield, 7 Sim., 401.

The omission to require strict legal evidence of title before advancing money is not necessarily such negligence as would be attended with the same consequences as actual notice.

"The affairs of life could not go on without reasonable confidence, * * * and I think that, although both parties are innocent, one is, generally speaking, not sorry to see that the loss has fallen on that innocent party who employed and authorized the fraudulent person and thereby was remotely the cause of the fraud being committed." Per Campbell, L. C. Perry *vs.* Holl, 2 DeG. & J., 38.

In view of these statements of the limitations of the rule as to the duty of making inquiry in the purchase of real estate, it is submitted that it would be most unreasonable to hold that the purchaser of a bond made negotiable by statute, in order to facilitate its sale, should be required to ascertain, at his peril, whether the condition had been satisfied. Even if the obligor had been defrauded, and the delivery altogether fraudulent, it would have been the result of the obligor's own act in selecting an unfaithful depositary, and the rule enunciated by Mr. Justice Buller, in Lickbarrow *vs.* Mason, 2 Term Rep., 63, 70 (1 Smith's Leading Cases, eighth edition, star page 763), "We may lay it down as a broad, general principle that *wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it*," has been repeated by every judge from that day to this when such a condition of affairs has presented itself.

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